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National Funding for the Arts and Internal Revenue Code § 501 (c)(3)

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NATIONAL FUNDING FOR THE ARTS AND INTERNAL REVENUE CODE § 501(C)(3)

MICAHA J. BURCH*

ABSTRACT

For the large number of U.S. arts organizations whose existence depends on private charitable donations, qualification for federal tax exemption under I.R.C. § 501(c)(3) is effectively a requirement for survival. The federal tax rules directly affect the vitality and direction of arts in the United States by determining which organizations qualify for exemption and life-giving tax deductible contributions. These tax rules are arguably the largest single component of U.S. national arts policy, but because they are tucked away in provisions of the federal tax code that do not even use the word “art,” they remain somewhat insulated from the otherwise vigorous public discourse regarding arts funding. § 501(c)(3) generally requires arts organizations to meet the definition of “educational” in order to qualify for tax-exempt status. This is a problem because an exclusive focus on the demonstrably “educational” aspects of art undermines (or at least fails to address) the important democracy-enhancing justifications for publicly supporting art in the first place. In particular, the requirement that tax-exempt arts organizations meet the tax law’s definition of educational prevents the type of diversity—and subversiveness—that a successful arts policy should encourage and fosters the type of conservatism that renders direct support for the arts an incomplete policy. Part II of this Article discusses the justifications for public financial support for the arts and the two alternatives for delivering that support—directly (exemplified by the National Endowment for the Arts) and indirectly (as exemplified by the tax subsidy that is the subject of this Article). Part III examines the current interpretation of § 501(c)(3) as it applies to arts organizations and identifies its inadequacies in light of the reasons for publicly supporting art. Part IV recommends explicitly adding arts organizations to the list of those eligible for tax exempt status under § 501(c)(3). An explicit statutory identification of arts organizations as deserving of tax exempt status (by virtue of being artistic rather than educational) would better protect arts funding from changing political winds and free arts organizations to fulfill their role in our democracy—resisting the tyranny of the status quo and providing a counterbalance to headlong scientific and technological advancement. In this way, federal tax law can better do its part in implementing national arts policy.

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I. INTRODUCTION

As a by-product of the interaction between American private philanthropic largesse and federal tax law, the U.S. government supports the arts not only by directly funding art organizations, but also through an indirect “tax subsidy.” This indirect “subsidy” is the tax revenue that the government forgoes when it allows a tax deduction (and corresponding tax exemption) for charitable contributions, in this case, to arts organizations.¹ In fact, the government now provides as much funding to the arts via this indirect tax subsidy as via direct funding.² Many discussions of arts funding mention this tax

1. See generally STAFF J. COMM. ON TAXATION, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS, JCX-37-08 (May 12, 2008) (calling for a revised tax expenditure taxonomy that would explicitly include the concept of a “tax subsidy” for specific tax provisions that diverge from one of tax law’s identifiable general rules and that collect less revenue than such general rule). This Article focuses on the federal income tax subsidy resulting from the tax exemption granted to certain qualifying arts organizations and the attendant deductibility by donors of charitable contributions (referred to herein as the “tax subsidy”) to such organizations. While these two components of the tax subsidy are analytically and legally separate and distinct, they are at times discussed collectively (or interchangeably) for the purposes of this Article. Of course, many governmental policies could be accurately described as indirect subsidies for the arts, including upholding law and order, providing for economic prosperity, participating in and encouraging free international trade, enforcing copyright and other intellectual property laws, and the like. Other forms of indirect subsidies (including tax-based subsidies via other provisions of the federal income, estate, property, and other tax regimes) are not discussed in detail.

2. In 2006, the most recent year for which reliable statistics are available, private donations made up 43% of nonprofit arts organizations’ funding, or \$13.5 billion. NATIONAL ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS, 1, 18 (2d ed., 2007). Public direct support accounts for 13%, or \$4 billion. *Id.* at 1, 3. However, about \$1 billion of this public support is for cultural, rather than arts, organizations, meaning that direct governmental funding for the arts from all levels of government totaled around \$3 billion. *Id.* at 10. This amounts to approximately 10% of the total revenue for nonprofit arts organizations in the U.S., and the National Endowment for the Art’s (NEA) annual support equals less than 1% of such revenue. *Id.*

Of that total, \$12.5 billion was contributed to organizations in the arts, culture, and humanities. CTR. ON PHILANTHROPY AT IND. U., *supra*, at 12-13 (total private charitable contributions by all U.S. donors in 2006 totaled \$295 billion (approximately 2.2% of GDP), three-quarters of which came from individuals). Forgone federal income tax revenue with respect to these contributions to arts organizations is approximately \$3 billion—or roughly the same amount as all direct governmental support for the arts combined—assuming a blended average tax rate of 30%. See NATIONAL ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS, *supra*, at 1. Professor Cowen, in one of the few works to elaborate on the importance of the tax subsidy for the arts, has observed that “[t]he tax system provides the most significant arts subsidy in the United States.” TYLER COWEN, GOOD & PLENTY: THE CREATIVE SUCCESSES OF AMERICAN ARTS FUNDING, 33 (2006); see also J. Mark Davidson Schuster, *Issues in Supporting the Arts through Tax Incentives*, 16 J. ARTS MGMT. & L. 31 (1987) (“taxes forgone through various arts-related tax incentives provide at least three times the amount of direct aid to the arts from all levels of government.”). More common are commentators who equate arts funding policy with only direct

subsidy only in passing, if at all.³ Such discussions even more rarely address *how* the tax code effectuates this subsidy for the arts—and whether or not it is effective.⁴

Government involvement in the arts has always been a polarizing political issue; and it is an issue that seems to be forever current. Despite the prolonged and deepening worldwide financial crisis and a continuing global war on terror, there is vigorous ongoing debate regarding the general state of the arts in the United States.⁵ One of the most controversial elements of the recently passed nearly \$800 billion economic stimulus bill was the \$50 million of additional funding for the National Endowment for the Arts (NEA).⁶ The seemingly dis-

funding. See, e.g., SUSAN BOREN, CONG. RESEARCH SERV., ARTS AND HUMANITIES: BACKGROUND ON FUNDING (2005). Of course, donations of time and effort are not accounted for by anyone—and may be more than twice as valuable as donations of money.

Some further back-of-the-envelope calculations reveal that approximately 80% of the roughly \$16 billion of nonprofit arts organizations' contributed income (from all sources public and private) in 2006 was nominally provided by private donors (and 20% by direct public support). See NATIONAL ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS, *supra*, at 1. However, because of the indirect tax subsidy discussed herein, the actual incidence of this support is split between private and public sources in something closer to a 60%-40% ratio. The impact of the current financial crisis and the attendant governmental spending on these estimates is unknown but likely to be large; nonetheless, the essential point that indirect support is of the same magnitude as direct support remains.

3. Even the NEA, in its definitive report, *How the United States Funds the Arts*, only notes that “[t]he figures on government support exclude the enormous indirect subsidy the federal government provides by making cultural contributions tax-deductible.” NATIONAL ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS, *supra* note 2, at vi. Many commentators, including the NEA itself, laud the “ingenious diversity and endless creativity of ways in which the arts are funded in the United States.” *Id.* at v.; see also COWEN, *supra* note 2, at 3 (positing that American arts policy’s decentralization “encourages artistic creativity, keeps the politicization of art to a minimum, and brings economics and aesthetics into a symbiotic relationship.”); cf. BILL IVEY, ARTS, INC.: HOW GREED AND NEGLECT HAVE DESTROYED OUR CULTURAL RIGHTS 200(2008) (observing that “[n]onprofit status became important to the fine arts with tax legislation in 1916 and 1917”).

4. “For the United States, cultural policy still languishes as the final, mostly unexplored realm of public policy.” IVEY, *supra* note 3, at 21.

5. See, e.g., COWEN, *supra* note 2, at 1-30 (describing perspectives on government funding for the arts); IVEY, *supra* note 3, at 21 (arguing that a “Cultural Bill of Rights” is needed to “engage heritage and expand individual creative capacity”); *Congress Targets Philanthropy*, WALL ST. J., Dec. 24, 2008, available at <http://online.wsj.com/article/SB123008104731031939.html>.

6. The \$50 million for the NEA was in the original House version of the bill. The subsequent Senate version of the bill did not include the NEA funding (but did include an amendment (that passed by a 73-24 vote) *prohibiting* stimulus funding for arts centers, theaters, and museums). Even arts-supporting Democrats, such as Senator Diane Feinstein of California, voted for the amendment, citing the need to “invest in critical infrastructure.” An intensive lobbying effort by arts groups and sympathetic legislators preserved the NEA funding in the final version of the bill (and eliminated the amendment that would have excluded certain arts entities from any recovery money). Nonetheless, opponents of the bill such as Representative Eric Cantor of Virginia, the third-ranking House Republican, continue their criticism, calling the NEA funding, among other things, “pork barrel spending.” Critics such as Georgia Representative Jack Kingston have additionally called for a reexamination of all of NEA’s funding. Michael Kranish, *Stimulus Funding for Arts*

proportionate controversy over 0.006% of the stimulus package combined with recent calls for a congressional re-examination of the charitable deduction in general (and a return to the “classical” conception of charity) continue the pattern of regular and persistent controversy surrounding arts funding.⁷

The timelessness of the debate surrounding arts policy suggests the universality of the underlying issue—the need to balance aesthetic and economic sensibilities that “is a general prerequisite of rational policy evaluation.”⁸ In an economic age of information and creativity, arts policy is an important indicator of how the United States supports creative endeavors generally.

Given the astronomical numbers being thrown around with respect to federal fiscal outlays in the coming years, the financial stakes involved in public arts funding are relatively small (especially in light of its symbolic significance). This fact, along with the advantages of decentralized support over direct support and the dire straits in which many arts organizations find themselves, suggest an opportunity to improve and expand, rather than curtail, the federal tax code’s implementation of national arts policy.⁹

Part II of this Article discusses the justifications for public support for the arts and the two general institutional alternatives for deliver-

Hits Nerve: Some Doubt Jobs Would be Created, BOSTON GLOBE, Feb. 5, 2009, National Section, at A1.

7. See, e.g., Suzanne Perry, *Paying It Forward—and Back*, CHRON. PHILANTHROPY, Sept. 4, 2008 (quoting ranking Senate Finance Committee member Senator Charles Grassley (R-IA) and Finance Committee Chairman Senator Max Baucus (D-MT) regarding the likelihood of congressional hearings on the charitable deduction, and Democratic Congressman Xavier Becerra, a member of the House Ways and Means Committee, regarding limiting the charitable tax deduction to contributions to organizations that can show their direct service to the poor and disadvantaged). The President’s 2010 budget, in addition to the increased NEA funding, also includes a proposal to limit the tax subsidy for (itemized) deductible expenses (such as charitable donations) at twenty-eight cents for each dollar of deductible expenses for taxpayers with incomes in excess of \$250,000 (the subsidy for each additional dollar of deductible expenses under current law is equal to the taxpayer’s marginal tax rate, which for the top two tax brackets is 33% and 35%). Philip Rucker, *Obama Defends Push to Cut Tax Deductions for Charitable Gifts*, WASH. POST, Mar. 26, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/25/AR2009032503103_pf.html (last visited Mar. 26, 2010).

8. Cowen, *supra* note 2, at 3; see also Bill Ivey, *The Corrosive Incoherence of the U.S. Arts System*, HEDGEHOG REV., 51, 52 (Summer 2004). (“[O]utcomes in art are determined by systems that advance or constrain the creative process.” Thus, the fate of the arts will be resolved by public policy, “because that is where society engages the norms and architecture of arts systems, the assumptions and categorical distinctions that define the balance among the key ingredients of art making: artistic vision, economic vitality, and the public interest.”).

9. This Article accepts the by no means universally accepted proposition that the tax system is a capable and appropriate vehicle for carrying out such a non-tax policy as arts support. An analysis of the proposition’s validity is beyond the scope of this Article, but the entrenched reality of the tax code’s sprawling mandate suggests that no relevance is sacrificed by accepting the proposition.

ing that support—direct support, exemplified by funding for and by the NEA, and indirect support, as exemplified by the tax subsidy that is the subject of this Article. Part II concludes that, as a general matter, the justifications for arts funding warrant indirect support via the tax subsidy. Part III examines the current implementation of the tax subsidy for arts organizations via the application of I.R.C. § 501(c)(3) and identifies how this mechanism for decentralized funding, despite its successes, does not fully address the concerns justifying its existence. Part IV recommends that, in order to more fully capitalize on the strengths of our decentralized arts funding policy, Congress should amend I.R.C. § 501(c)(3) to explicitly list arts organizations as eligible for tax exempt status.

II. PUBLIC SUPPORT FOR THE ARTS

A. *Justifications: Market Failure and Democracy-Enhancing Positive Externalities*

There is vigorous public and academic debate regarding the question of whether or not support for arts is a proper function of government, and if so, how government should execute that function. While recognizing that there is no agreement regarding whether the arts, or a variety of endeavors, should be publicly funded, let alone the justifications for such funding, this Article accepts a particular set of justifications for arts funding and assesses the effectiveness of the tax subsidy in light of those justifications. Specifically, this Article accepts the economic description of market failures to explain why arts are deserving of public support and an account of art's positive externalities that, according to the statutory declaration of findings and purposes, motivated Congress to create the NEA.

To the extent there is a generally accepted economic justification for the public support of the arts, it is, in economic terms, the failure of the market to properly account for art's positive externalities.¹⁰ As a public good, like information itself, the production and consumption of art produces societal benefit that exceeds the amount of personal benefit economic decision-makers take into account when making art re-

10. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 848-54 (1980) (“[E]ach individual should contribute toward [the] production [of a public good] equal to the value he places upon it However, individuals have an incentive to contribute little or nothing.”) [hereinafter Hansmann, *The Role of Nonprofit Enterprise*]; Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 66 (1981) (“[I]n order to determine whether the exemption is good policy...justification might be sought...in the existence of uncompensated benefits (‘beneficial externalities’) that the activity brings to the society at large.”); see also 20 U.S.C. § 951(7) (2006) (“[I]t is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.”) [hereinafter Hansmann, *Rationale*].

lated decisions, such as whether or not to fund artistic endeavors with pre-tax dollars or exempt from tax the income of arts organizations.¹¹

There are numerous interrelated theories regarding why the market fails to properly account for art's positive externalities. For example, the "productivity" market failure faced by services and labor (of which the arts are a very special case) arises because technological advances cause capital productivity growth to outpace human productivity growth.¹² The "capital markets" theory of market failure with respect to the arts suggests that subsidization is appropriate because nonprofits that provide public goods cannot access public markets for capital.¹³

Another account of the market failure problem when it comes to art is a version of the familiar "free rider" problem.¹⁴ A free rider problem exists when markets do not provide sufficient incentives to pay for art at the optimal level because, whether one pays or not, one will receive some of the benefits from the art that is paid for by others.¹⁵ A compelling corollary of the free rider problem that is of long-term national concern is the intergenerational externality theory, which posits that the market fails to account not only for contemporaneous positive externalities, but also for the preferences of future generations.¹⁶ This is an especially relevant consideration in the art

11. Generally, economists define "public goods" as any good the use of which by one person does not preclude anyone else's use and the access to which cannot be denied whether or not one has paid for it. See Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 10, at 848. While arts organizations such as museums can in some instances restrict access to works of art (for example, to a finite number of paying customers), it cannot preclude the enjoyment of art's externalities. For an argument that art is not a public good, see generally Andrew Chamberlain & Mark Sussman, *Charities and Public Goods: The Case for Reforming the Federal Income Tax Deduction for Charitable Gifts*, TAX FOUNDATION SPEC. REP., No. 137, 8 Nov. 2005 (describing economic pressures on the performing arts which are "a consequence of what might be considered the technology of their operations").

12. See generally WILLIAM J. BAUMOL & WILLIAM G. BOWEN, *PERFORMING ARTS—THE ECONOMIC DILEMMA: A STUDY OF PROBLEMS COMMON TO THEATRE, OPERA, MUSIC AND DANCE* (1966).

13. See Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 10, at 848-54.

14. JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 100-13 (1995); see also Mark Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1398-1406 (1988) (justifying charitable deduction in part as response to free riding); David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 224 (2009) (identifying and analyzing three "information" or "incentive" problems justifying subsidized charity: the free-rider problem, measurement and responsiveness to popular preferences regarding public goals, and recruiting private donors to monitor quality in the nonprofit sector). Regarding how donors respond to subsidies, see generally Gerald E. Auten, Charles T. Clotfelter & Richard L. Schmalbeck, *Taxes and Philanthropy Among the Wealthy*, in DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 392 (Joel B. Slemrod, ed., 2000).

15. COLOMBO & HALL, *supra* note 14, at 101.

16. See Baumol & Bowen, *supra* note 12, at 385 (intergenerational externality problem is the case "par excellence" for public support); see also Barbara Hoffman, *Law for Art's Sake in the Public Realm*, 16 COLUM. J.L. & ARTS 39, 44 (1991) ("It is . . . ironic that con-

context, as the true value of art is often not known until long after its production and initial reception.

Market failure descriptions are, of course, based upon the existence of art's positive externalities. The literature tends to gloss over this part of the inquiry; the necessary task of actually describing the nature of art's positive externalities is more difficult than instincts might lead one to believe. Indeed, "[w]henever law seeks to protect or encourage the arts, it, like many other institutions, assumes that the arts are intrinsically valuable."¹⁷ This is not a particularly satisfactory description of the virtues of art from an intellectual perspective. Furthermore, such a justification for public support of the arts is unlikely to be persuasive to one who has not already internalized art's putatively intrinsic personal and societal benefits. Nor is such a tautology likely to yield well-designed, targeted, and effective support programs. A more thoughtful and explicit reckoning of art's benefits is required in order to properly evaluate and suggest improvements to current arts funding policy.

If we think art is valuable to the public as a whole only because it is educational, then it makes sense to require that arts organizations demonstrate that they serve strictly educational purposes (as under current tax law). If, however, we think that the value in art also lies in some of its other characteristics, the formulation of sound policy requires that we identify these characteristics as well. The assumption that art is educational is not immutable. As politics and public opinion shift over time, it might not always be the case that art is assumed to be inherently educational and thus worthy of I.R.C. §501(c)(3)'s blessing. At any rate, the rationale for supporting art might dictate different policy than the rationale for supporting education more generally.

The security of this nation's commitment to the arts is best served by identifying benefits from art that are not dependent upon circular and politically charged assumptions. Drawing upon the findings in the NEA's authorizing statute, this section outlines a set of justifications in support of the federal income tax exemption for arts organizations that captures art's unique benefits vis-à-vis democracy—its ability to resist hegemony, to promote the private intellectual freedom that is a prerequisite to public spheres of freedom, and to counterbalance and complement scientific and technological advancement.

As many commentators have noted, justifications for arts funding, whether direct or indirect, generally fall into one of two groups—the *economic justifications* or the *sociological/political/aesthetic justifi-*

troversial public art works . . . often become prized civic icons as public understanding grows and deepens with the passage of time.”).

17. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 810 (2005).

cations.¹⁸ Although useful for purposes of discussion and analysis, the bifurcation of justifications for arts support noted by so many scholars is not inevitable. Professor Colombo's "enhanced access" theory is an example of another way to resolve the apparent duality.¹⁹ Professor Colombo argues that "enhancing access" fits both explanations and should be the primary criterion upon which a determination of tax exemption for charitable organizations is based because it simplifies a difficult inquiry and focuses nonprofits on their duty to provide something the market does not.²⁰ This Article posits a synthesized justification for arts support: the positive externalities giving rise to the market failure (pursuant to economic theory) are, in fact, based on aesthetic, noneconomic concerns.²¹

Art is most profoundly in the national interest because of the way in which it affects the quality of our cultural life and the functioning of our democracy.²² The market on its own fails to properly account

18. Professor Schuster writes, "A complete analysis of a tax incentive would evaluate it from two perspectives: with respect to its economic effects and with respect to its cultural and aesthetic effects." Schuster, *supra* note 2, at 32. Professor Cowen notes the difficulty in reconciling "economic and aesthetic values." COWEN, *supra* note 2, at 3. Professor Colombo identifies two groups of theories: "sociological/political" and "economic." John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 364 (2004).

19. Professor Colombo also identifies (and discounts) two lines of reasoning that resist categorization in one of the two identified groups: the "income definition" theory and the "relief of governmental burden" justification. Colombo, *supra* note 18, at 364 n.84; cf. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976) (discussing congressional enactments exempting from taxation nonprofit versus profit-making corporations). This Article ignores the "income definition" theory of tax exemption because I argue herein that commerciality is somewhat of a red herring in evaluating the eligibility of arts organizations for tax exemption; it may very well be the case that arts organizations pursue their goals via, at some level, seeking to produce income. The "relief of governmental burden" formulation in practice authorizes a set of activities that roughly aligns with the more "classical" definition of charity. If taken literally as an overarching theory, the formulation is too narrow to be considered practical given the tremendous variety of subsidized charitable endeavors (but see note 7 regarding possible congressional reconsideration of the scope of the charitable deduction). If read liberally, the issue becomes the definition and scope of governmental burdens and whether or not they include the responsibility to correct market failures—a discussion to which this paper's arguments are adaptable.

20. Colombo, *supra* note 18, at 345-46.

21. It is often claimed that support for the arts creates jobs and bolsters the economy; in other words, it provides positive externalities that are economic in nature. The advocacy group Americans for the Arts, for example, reports that nonprofit arts organizations generate approximately \$166 billion for the economy each year, supply almost \$30 billion in tax revenue, and provide the equivalent of full-time employment for 5.7 million people. Americans for the Arts, *Arts & Economic Prosperity III: The Economic Impact of Nonprofit Arts and Culture Organizations and Their Audiences*, at 3, http://www.americansforthearts.org/pdf/information_services/research/services/economic_impact/national_findings_summary_report.pdf (last visited Mar. 26, 2010). However, this line of argument alone is unsatisfactory as a justification for arts funding in particular because arts are not unique in their provision of ancillary economic benefits to their practitioners and communities. It is, in fact, their noneconomic contributions to society that make the arts special.

22. See 20 U.S.C. § 951(4) (2006) ("Democracy demands wisdom and vision in its citizens. It must therefore foster and support . . . access to the arts and the humanities, designed

for these sociological/political/aesthetic qualities of art. To the extent public support is the proper response, the question remains how to structure that response.

Under the synthesized justification explained above, there are two broad reasons for governmental support of the arts. Art uniquely creates democracy-enhancing and nation-strengthening externalities by:

- 1) Fostering national respect and international leadership commensurate with, and complementary to, the nation's prominence in other endeavors (so-called "soft power"); in particular, art serves as a counterbalance to technological and scientific advancement; and
- 2) Contributing to the intellectual freedom and versatility that is required for a democracy to function properly.²³

to make people of all backgrounds and wherever located *masters of their technology and not its unthinking servants.*") (emphasis added); *see generally* ELLEN DISSANAYAKE, *HOMO AESTHETICUS: WHERE ART COMES FROM AND WHY* 3 (1992) (arguing "answers to human questions and desires are to be found in (what should be evident in the name we give them) 'humanities'"); ELLEN DISSANAYAKE, *WHAT IS ART FOR?* (1990) (arguing that art-making is a trait of human evolution—derived from the mother-child interaction—that fosters community, social coherence, and love); PAUL WOODRUFF, *THE NECESSITY OF THEATER: THE ART OF WATCHING AND BEING WATCHED* (2008) (arguing that theater is necessary "to secure our bare, naked cultural survival" because it fosters empathy and ethicality).

23. Arts support also serves to enhance democracy by preserving America's unique and globally important cultural heritage. This justification is perhaps the most widely accepted (and inherently conservative) justification of public support for the arts. *See* 20 U.S.C. § 951(6) (2006) ("The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups."). Implicating the intergenerational externality theory discussed above, theorists such as Ronald Dworkin have made the case that cultural preservation is an appropriate state function because it preserves a store of cultural "language" from which citizens can draw when choosing among conceptions of the good life. RONALD DWORIN, *A MATTER OF PRINCIPLE* 229-30 (1985) (stating that a "rich cultural structure . . . multiplies distinct possibilities or opportunities of value"). John Dewey formulates the point in more dramatic terms: "The works in which meanings have received objective expression endure. They become part of the environment, and interaction with this phase of the environment is the axis of continuity in the life of civilization." JOHN DEWEY, *ART AS EXPERIENCE* 326 (1958). Even more dramatically, upon signing the National Foundation on the Arts and the Humanities Act (establishing the NEA), President Lyndon Johnson said, "Art is a nation's most precious heritage. For it is in our works of art that we reveal to ourselves and to others the inner vision which guides us as a nation. And where there is no vision, the people perish." JOSEPH WESLEY ZEIGLER, *ARTS IN CRISIS: THE NATIONAL ENDOWMENT FOR THE ARTS VERSUS AMERICA* 17 (1994). The statute establishing the National Foundation on the Arts and Humanities identified its purpose to "develop and promote a broadly conceived national policy of support for . . . institutions which preserve the cultural heritage of the United States" 20 U.S.C. § 953(b) (2006). Institutions such as the Library of Congress and the Smithsonian Institute illustrate the government's commitment to, and public support for, cultural preservation efforts. There is relatively little controversy regarding the bulk of direct governmental support for the arts that relates to cultural preservation efforts. Direct support, such as via the NEA and to the Smithsonian Institution, and indirect support generally work together effectively toward the same goal with respect to this aspect of public support for the arts. For

1. *Soft Power and Counterbalance to Science*

There are a number of ways in which support for the arts can enhance the nation's soft power.²⁴ What Professor Cowan has identified as the "prestige argument" posits that arts funding has value by virtue of enhancing national symbolism and prestige and that U.S. taxpayers can and do appreciate this value even if they are unwilling to pay directly for art themselves.²⁵ Even if the arts would flourish without subsidies, the benefit, according to this argument, is in having "a state that honors creativity and backs up that honor" with expenditures.²⁶ For many, government support for the arts supplies something that the market by definition cannot—government support for the arts. For such taxpayers, living in a society that values and supports the arts is in and of itself a "good" that they would argue redounds to the benefit of everyone.²⁷

The arts are also a determinant of the country's international standing. Perhaps one of the only aspects of American society to consistently generate mostly positive worldwide reaction is its creative output. The arts, aided by public support and taken as a whole, have been a constant source of international goodwill.²⁸ Art and culture are

this reason, this justification is not discussed at length with respect to the unique advantages of indirect support.

24. See 20 U.S.C. § 951(8) (2006) ("The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit."). Barack Obama's presidential campaign policy paper on the arts cites America's need to support greater arts education so as to "remain competitive in the global economy" by expanding partnerships between schools and arts organizations, creating an "Artist Corps" of educators to work in low-income schools, increasing NEA funding, and promoting cultural diplomacy. "Artists can be utilized again to help us win the war of ideas against Islamic extremism." Obama for America, *Barack Obama: A Champion for Arts and Culture*, <http://www.artsactionfund.org/pdf/artsvote/Obamaarts2.pdf> (last visited Mar. 26, 2010).

25. COWEN, *supra* note 2, at 24-27.

26. *Id.* at 25.

27. The good feeling many get from living in a society that funds the arts is akin to a "warm glow"—the benefit one gets from the knowledge that one's gift is the source of someone else's pleasure. See LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* 261 (2008). One might also generate the same warm glow by directing public money to a chosen donee. Gifts such as charitable contributions generate positive externalities by creating "double utility"—utility for both the donor and the donee (and in some cases, for society generally). See Schizer, *supra* note 14, at 230-31. This notion may help explain why arts funding centers on fine art rather than popular culture: in terms of prestige, government funding of popular culture might confer upon the government just the opposite—negative prestige. For particular Americans, of course, any government funding of the arts creates negative prestige because of the whiff of socialism or the forced association of the arts with governmental bureaucracy. COWEN, *supra* note 2, at 144.

28. Public support has helped the United States lead the way in jazz, modern architecture, abstract expressionist painting, abstract art, contemporary classical composition, avant-garde fiction and poetry, street art, modern dance, and even Hollywood action movies. See COWEN, *supra* note 2, at 2-3. President Obama's campaign website exclaims that

important implements of informal diplomacy and soft power.²⁹ As such, a flourishing, unhindered, publicly supported arts sector contributes in real ways to the nation's international standing.

One such way is by complementing the nation's technological advances. Explicit in the National Foundation on the Arts and Humanities Act's precatory language is the notion that a flourishing arts sector is a national priority because of its instrumental role as a counterbalance to the nation's technological sophistication and scientific advancement.

An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.³⁰

...

The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.³¹

It is important, then, that the arts be put on an equal footing with public support for science and technology. Efforts at establishing a "third culture" between modern society's two cultures of science and the humanities acknowledge the important interrelationship between them with respect to solving the world's problems. This relationship is further discussed in the context of I.R.C. §501(c)(3) in Part III.B. below.

"Our nation's creativity has filled the world's libraries, museums, recital halls, movie houses, and marketplaces with works of genius." Obama for America, *supra* note 24.

29. The Cold War was the peak of direct governmental arts support. Policymakers saw the arts as a potent propaganda weapon, believing that "if American culture could be shown to be strong and creative, democracy would look good." COWEN, *supra* note 2, at 74; see H.R. REP. NO. 618, *reprinted in* 1965 U.S.C.C.A.N. 3186, 3191 (claiming the authorizing statute would create a National Foundation on the Arts and Humanities that "would serve not only to deepen our understanding of our friends and allies throughout the world, but would strengthen the projection of our Nation's cultural life abroad and enable us better to overcome the increasing 'cultural offensive' being waged by Communist ideologies"). Analogous American efforts can now be seen in the Middle East, as the government has poured hundred of millions of dollars into efforts such as Radio Sawa (to broadcast popular Arabic music and news from an America-friendly perspective) and Al Hurra (regional Arabic-language television station). See Glenn Kessler, *The Role of Radio Sawa In Mideast Questioned: U.S.-Funded Station Lacks Influence, Report Indicates*, WASH. POST, Oct. 13, 2004, at A12; Alvin Snyder, *Al-Hurra: Struggle for Legitimacy*, ARAB NEWS, Dec. 1, 2005, available at <http://www.arabnews.com/?page=7§ion=0&article=74004&d=1&m=12&y=2005>. The Obama administration has expressed its intention to increase its use of soft power, including the arts, abroad. See Obama for America, *supra* note 24.

30. 20 U.S.C. § 951(3) (2006).

31. 20 U.S.C. § 951(8) (2006).

2. Intellectual Check and Balance

The value to the nation of a flourishing arts sector also lies in its contribution to an imaginative and critical way of thinking that is the analog to the multi-branched constitutional structure of government; its purpose is to check and balance an enemy of effective democratic participation, the tyranny of the status quo.³² In turn, arts funding brings the arts “within the push and pull of democratic discourse,” makes it a matter of public concern, and elevates its abstract virtues above dollars and cents.³³

For purposes of national public support, art’s chief positive externality lies in its ability to foster the type of anti-tyrannical thought necessary for a vibrant democracy.³⁴ The inherently subjunctive, im-

32. See 20 U.S.C. § 951(4) (2006) (“Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.”). John D. Rockefeller III stated in testimony before Congress regarding the creation of the National Council on the Arts, “Democratic government and the arts are, in my opinion, in league with one another, for they both center on the individual and the fullest development of his capacities and talents. To freemen, the arts are not incidental to life but central to it.” *National Arts Legislation: Hearing on S. 165 and S. 1316 Before the Special Subcomm. on the Arts of the S. Comm. on Labor and Public Welfare*, 88th Cong., 191, 198 (1963).

33. COWEN, *supra* note 2, at 25. A tempting possibility for the identification of art’s virtues is simply its relation to happiness. IVEY, *supra* note 3, at 99-106 (“If democracy offers a single, overarching promise, it is that our system of government, linked, perhaps, to an equitable and energetic economy, will produce widespread happiness. . . . [A]rt unquestionably gives us a way to pursue self-realization Art making is spiritual, long-lasting, and . . . relatively inexpensive; it contains and even expands many parameters of a well-lived life that have to date mostly been attributed to only work, religion, family, and community. In addition, an engagement with art permits us to indulge our drive toward success and self-realization without forcing us to buy into the nastiness of America’s unhappy rat race. It is the yin of individual achievement that complements the yang of heritage, making our expressive life whole. Thus completed, a rounded expressive life can be a reservoir holding the two overarching ingredients of happiness—adventure and security.”); see, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (interpreting the 14th Amendment’s due process clause to guarantee a right to privacy as part of a right to the pursuit of happiness); see also Harry Kalven Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16 (“[B]eauty has constitutional status too, and . . . the life of the imagination is as important to the human adult as the life of the intellect.”). For a discussion of satisfaction of the citizenry’s appetite for and enjoyment of cultural activities as a basis for funding art, see FANNIE TAYLOR & ANTHONY L. BARRESI, *THE ARTS AT A NEW FRONTIER* 25-27 (1984). See also Pamela J. Lajeunesse, *Tax Incentives for Support of the Arts: In Defense of the Charitable Deduction*, 85 DICK. L. REV. 663, 702 (1980-81) (stating that “89% of the adult population believe that the arts are important to the *quality of life* of their communities”)(citing Hightower, *A Report on the Arts*, in 2 COMM’N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, U.S. DEPT. OF THE TREAS., RESEARCH PAPERS at 714 (1977)).

34. See COWEN, *supra* note 2, at 29 (“A long tradition in philosophy, as exemplified by Plato’s Socrates, argues that the most moving artworks tend to be the most dangerous and to hold the greatest appeal to the base parts of our souls.”); Hoffman, *supra* note 16, at 74 (“[C]ontroversy is both an inevitable and acceptable part of public art—debate leads to understanding and acceptance of new ideas.”); *id.* at 93 (“[G]overnment’s involvement in the

aginative nature of making and experiencing art fosters the ability to conceive of otherness and how things could be—an ability necessary if democracies are to adapt, grow, and evolve.

By engaging alternative intellectual dimensions, art forces consideration of realities apart from the status quo, and thereby combats orthodoxy of all sorts, including governmental.³⁵ This unique feature of art has been explored in the context of constitutional law, which recognizes art's compatibility with the First Amendment's anti-tyrannical purpose.³⁶

arts . . . must offer freedom to artists in order to provide society with the capacity to expand its horizons and grow intellectually.”).

35. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (“[T]he provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”) (Powell, J., concurring); see also Edward J. Eberle, *Art as Speech*, 11 U. PA. J. L. & SOC. CHANGE 1, 21 (2007) (“The alternative cognitive and sensory world posed by art speech effectively conveys consideration of views of reality different than official or accepted ones.”); Nicholas Wolterstorff, *Is Art Salvific?*, HEDGEHOG REV.: THE FATE OF THE ARTS, 36, 42 (Summer 2004) (“[E]ver since the days of early Romanticism, [the import of the social otherness of art] has been that in composing and presenting his work of unity and purposeless rationality, the artist both launches a critique against the fragmentation, rationalization, and oppression of social reality as we know it, and sets before us an image of an alternative reality; in that way, the work harbors the potential of being an agent of social reform.”).

36. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 109 (1996) (“Art—like religion, political speech, the press, assembly, and grievance redress—is essential to freedom from the entrenched institutionalization of government.”). Not coincidentally, the constitutionally protected freedoms other than political speech—religion (explicitly), and the press, assembly, and grievance redress (indirectly)—are also covered by I.R.C. § 501(c)(3). In the landmark obscenity case *Miller v. California*, the Supreme Court placed artistic speech—but only if it had serious artistic value—along with speech having literary, scientific, or political value on the list of nonobscene types of speech. 413 U.S. 15, 26 (1973).

First Amendment doctrine suggests that (certain) art is presumptively protected speech. See, e.g., *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (“Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.”); *Finley v. National Endowment for the Arts*, 100 F.3d 671, 682 (9th Cir. 1996) (“As the district court explained, the arts, no less than the university, are ‘at the core of a democratic society’s cultural and political vitality.’”) (citing *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992)), cert. granted, 522 U.S. 991 (1997), rev’d (on other grounds), 524 U.S. 569 (1998); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (explaining that entertainment (particularly motion pictures) may “affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”); see also Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding of the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353 (1995) (discussing Constitutional protection of artistic expression).

This inquiry, of course, begs the question again: What is art? See Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) (describing the difficulty courts might face in attempting to draw a distinction between art and obscenity); Richard A. Posner, *Art for Law’s Sake*, 58 AM. SCHOLAR 513, 517 (1989) (observing that judges often must resolve indeterminate questions and might decide “issues of value and taste” in art while keeping “public respect” if using “appropriate caution”).

There is an interesting dichotomy between how art (and speech) is viewed for funding purposes compared to an analysis under the First Amendment. As a matter of constitutional law and free speech, “political” art is favored and given the utmost protection. Hoff-

It is not, however, solely the political speech aspect of art that implicates its democracy-enhancing values—it is also the nondiscursive and nonrational elements of art that are most central to its “liberty value.”³⁷ To be sure, much artistic expression has, at some level, both rational message driven elements and nonrational, nonsemantic elements. These latter elements allow for the type of imaginings that are “invaluable against the bewitchment of one’s common sense by the potent and prevailing powers in society, including those of the government.”³⁸ Whether or not rock and roll, science fiction, or poetry has a message or is educational, it can excite in one a state of mind that is immune from totalitarianism—which operates by homogenizing what and how people think. The most important tyranny that art addresses is a tyranny of the status quo that encroaches upon one’s *private* sphere of thought.³⁹ Democracy is limited by what its participants can imagine. By expanding the ways in which people observe, express, and understand, art can expand the possibilities for democratic action. In so doing, it addresses the tyranny of the status quo that can stifle the country’s ability to change along with an ever changing world.

* * *

man, *supra* note 16, at 62 (noting that, as a result of a series of Supreme Court First Amendment decisions dealing with nonverbal expression, “artistic expression is afforded full protection only when the Court perceives that the artist has an evident political message or has dealt with a matter of public concern The danger in these trends is that artistic expression, particularly in the less traditional formats or media, may be seen as somewhat more marginal in value and deserving of less protection.”) With respect to public funding, it is explicitly disfavored.

37. See generally Hamilton, *supra* note 36, at 75, 111-12 (arguing that art’s nonrational, nondiscursive elements are central to the “liberty value of art” and should thus be afforded the most stringent First Amendment protection; that direct arts funding should therefore be carefully scrutinized; and that arts education should be prioritized); see also Eberle, *supra* note 35, at 16 (“[A]rt speech is a protected realm of freedom, outside the control of government and the majoritarian forces that form conventions and the normal rules of society.”); Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U. L. REV. 311 (1999). To a certain extent, religious activity shares with art a publicly-sanctioned focus on the nonrational dimensions of life. Eberle, *supra* note 35, at 14.

The analogy between First Amendment law and arts funding is again instructive; particularly with regard to obscenity. The *Miller* test for nonobscenity is “serious . . . artistic . . . value.” 413 U.S. at 26. This test is directly related to attempts to discriminate against whole categories of art, such as when NEA’s regulations were amended to prohibit the funding for art projects that “produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.” Act of Oct. 23, 1989, § 304, Pub. L. No. 101-121, 103 Stat. 701, 741(1989).

38. Hamilton, *supra* note 36, at 96.

39. Hamilton notes the “importance of the subversive, defamiliarizing value of art to the ongoing project of liberty” and that “the flourishing [of art] furthers the intangible and unquantifiable value of increasing the people’s capacity to resist hegemony.” *Id.* at 111-12; see JEAN DUBUFFET, ASPHYXIATING CULTURE AND OTHER WRITINGS 46 (Carol Volk trans., 1988) (1986).

To determine that art is worthy of public funding because it provides unique benefits to the country, however, is not to answer the institutional design question of how to best deliver that funding.⁴⁰ The next two subsections discuss direct and indirect funding in the arts context.

B. Direct Support: The National Endowment for the Arts

The relative merits of direct and indirect funding are well analyzed in the academic literature. Like most public funding endeavors that are sufficiently interesting and complex, the arts funding landscape is made up of a variety of direct and indirect support mechanisms. Direct support, as exemplified by the NEA, is only the most visible element of national arts policy. Despite the fact that the tax subsidy (in dollar terms) equals or exceeds direct governmental support, the former operates in the shadow of the latter.

There are numerous major arts programs in addition to the NEA that are directly funded by the federal government, including the National Endowment for the Humanities and the Office of Museum Services, the Smithsonian Institution (including the National Gallery of Art), the Kennedy Center, the Corporation for Public Broadcasting, the Commission of Fine Arts, the Art-in-Architecture program, and a variety of military programs, to name a few.⁴¹ However, it is with respect to the NEA that government arts policy is the most explicit and representative.

The purpose of the [National Foundation on the Arts and Humanities] shall be to develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States, and for institutions which preserve the cultural heritage of the United States pursuant to this subchapter.⁴²

One rough measure of the success and effectiveness of the NEA is the amount of support allocated to it in the yearly federal budget. NEA annual federal appropriations peaked in the early 1990s, hover-

40. See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 961 (2004) (discussing generally how best to implement a government program “given that such a program is going to be implemented”).

41. Cultural policymaking is “spread widely throughout the government through some 200 programs in at least 30 federal agencies.” CENTER FOR ARTS AND CULTURE AMERICA’S CULTURAL CAPITAL: RECOMMENDATIONS FOR STRUCTURING THE FEDERAL ROLE 4 (2001). The Department of Defense budget allocation for military bands, for example, has at times famously exceeded the entire NEA appropriated budget. See NATIONAL ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS, *supra* note 2, at 14.

42. 20 U.S.C. § 953(b) (2006); see also National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 89-209 §5, 79 Stat. 845, 846-49 (1965) (codified as amended, at 20 U.S.C. §§ 951-968 (2006)) (establishing the NEA). Specifically, Title 20 section 951 contains an elaborate, aspirational declaration of findings and purpose with respect to the National Foundation on the Arts and Humanities.

ing around \$170 million per year for the years 1992-1995.⁴³ A concerted conservative effort to kill the NEA in the mid-1990s on the heels of a series of notoriously controversial art projects that had received NEA money resulted in a funding decrease to around \$100 million per year for the years 1996-2001.⁴⁴ Thereafter, appropriations grew moderately but steadily, reaching \$155 million in 2009.⁴⁵

President Obama's recent massive economic stimulus package includes an additional \$50 million of funding for the NEA on top of its preexisting budget of \$155 million, as well as the \$25 million for the Smithsonian Institute.⁴⁶ However, this influx of cash was explicitly made as a remedial economic stimulus and was made against a skeptical congressional backdrop regarding arts funding.⁴⁷ In absolute terms, NEA funding is a drop in the bucket of public arts support (not to mention the stimulus package). But with or without the stimulus funding influx, as a relative matter, the NEA remains one of the largest *single* annual funders of the arts in the United States, and, until recently, the NEA was *the* single largest arts funder.

At any rate, the importance of the NEA does not derive solely, or even principally, from its absolute size in dollars (though that of course matters). Its importance exceeds its size because the imprimatur of NEA funding confers legitimacy and provides exposure, often leads to additional private funding, and can be essential to the very existence of the art form being supported.⁴⁸

43. National Endowment for the Arts, National Endowment for the Arts Appropriations History, *available at* <http://www.nea.gov/about/Budget/AppropriationsHistory.html> (last visited Mar. 26, 2010).

44. *See, e.g.,* Cynthia Koch, *The Contest for American Culture: A Leadership Case Study on the NEA and NEH Funding Crisis*, Public Talk: Online Journal of Discourse Leadership, <http://www.upenn.edu/pnc/ptkoch.html> (last visited Mar. 26, 2010).

45. National Endowment for the Arts, *supra* note 43. The NEA is congressionally mandated to distribute over 40% of NEA grant-making funds to state arts organizations. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Title VIII, 123 Stat. 115, 172 (2009). Thus, in 2007, the NEA gave approximately \$72 million in direct grants and gave \$48 million to state arts organizations to make their own grants. In addition, state government legislative appropriations to state arts organizations totaled over \$330 million in 2006, dwarfing the amount of direct federal arts funding. NATIONAL ASSOCIATION OF STATE ARTS AGENCIES, LEGISLATIVE APPROPRIATIONS ANNUAL SURVEY: FY 2006 (2007).

46. 123 Stat. at 171.

47. *See* note 7 and accompanying text. Increased funding also brings with it greater scrutiny, suspicion, and accountability.

48. Robert Lynch, head of Americans for the Arts, in pushing Congress for increased support of the NEA, said "NEA money has always been seen as probably the most important lever that we have in the arts . . . It's seen as a nod of approval from the federal government that this is an important symphony or theater or dance company." Laurence Arnold, *Arts Advocates Ask for 40 Percent Government Funding Increase*, Bloomberg.com, Mar. 12, 2007, *available at* <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ajxh6929.2Yk>. The NEA estimates that every dollar of direct NEA support generates more than seven dollars in additional outside support. *See* NATIONAL ENDOWMENT FOR THE ARTS, *supra* note 3, at 3. Even controversial NEA (or other) funding that spurs attacks and condemnation also gene-

The NEA also symbolizes America's commitment to, and excellence in, the arts. The organization exists for the purpose of promoting the arts, and the congressional findings and statutory purposes underlying its activities are the most explicit and well thought out expressions of American public policy toward the arts, regardless of the NEA's ability to actually fulfill those purposes. To a certain extent the NEA can be seen as a success. It fosters national pride, soft power, and "warm glow" for those who derive utility from living in a country that values the arts enough to publicly support them and helps to preserve the country's artistic heritage.

But the NEA did not emerge from the crisis-filled 1990s with its ability to support boundary-breaking, challenging art intact, if it ever had such an ability.⁴⁹ What started with the infamous controversy surrounding the partially NEA-funded 1989 exhibits of Robert Mapplethorpe's homoerotic photography and Andres Serrano's "Piss Christ" photography culminated in a Supreme Court ruling that upheld statutory decency standards applicable to art supported by NEA funding.⁵⁰ In addition to being a public relations disaster, the standards have made it more difficult for the NEA to fund risk-taking but worthy artistic expression. Justice Souter, dissenting in *National Endowment for the Arts v. Finley*, presciently noted that artists may either censor their work to avoid running afoul of the decency standard, or "refrain from seeking NEA funding altogether."⁵¹

The political reality and perception of direct grants has rendered the NEA ineffective when trying to play the role of arts venture capitalist, which is based on the idea that markets do not always effectively pick winners when it comes to art. Increasing conservatism and a rule precluding the NEA from funding most individuals,⁵² any

rates (perhaps unintentionally) publicity for the affected art forms and artists. On the other hand, "Support from the NEA has served as a seal of approval for art, which in the past had been seen as a 'safe' investment or contribution for conservative corporate and individual donors." Hamilton, *supra* note 36, at 115 n.164 (quoting NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 103 (1995)).

49. See, e.g., Kristine M. Cunnane, *Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v. Finley*, 31 CONN. L. REV. 1445, 1445-52 (1999).

50. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 569 (1998) (upholding 20 U.S.C. § 954(d)(1), which directs the NEA's chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"). While it is of course not the case that indecent art is itself automatically democracy-enhancing, the focus on decency distracts from the main point that in order for important, challenging art to be encouraged, its funding must be unfettered by preconceived notions. Sometimes decency and respect are the opposite of what is trying to be conveyed by meaningful art.

51. *Id.* at 621 (Souter, J., dissenting).

52. NEA funding for individual artists has steadily decreased, though such support is ostensibly part of the NEA's mission. 20 U.S.C. § 954(c) (2006) (NEA Chairperson authorized to make grants that foster "groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts."). Since 1997, however, Congress has prohibited the

for-profit projects, or more than half of any given nonprofit project means that the NEA now largely follows the market rather than complements it.⁵³

The pressures bearing upon the NEA do not necessarily prevent the organization from effectively fulfilling the role of preservationist of high culture and native and traditional arts and supporter of regional and ethnic-based art initiatives.⁵⁴ However, aside from this limited role for which the NEA is well suited, the failure of the NEA to advance the national arts agenda⁵⁵ makes the tax subsidy all the more crucial to the national arts funding landscape. Direct support cannot fully carry out the goal of fostering the type of art that enhances democracy and

NEA from making direct grants to individuals except for Literature Fellowships, NEA American Jazz Masters Fellowships, the NEA National Heritage Fellowships in the Folk & Traditional Arts, and, starting in 2008, National Opera Fellowships (the latter three being purely “honorific” awards, the Literature Fellowships are the only true remaining individual grants). See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2143 (2007) (adding National Opera Fellowships to limited list of permitted individual grants in § 309(1) of division E, Public Law 108-447); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 309, 118 Stat. 2809, 3094 (2004) (“Of the funds provided to the National Endowment for the Arts: (1) The Chairperson shall only award a grant to an individual if such grant is awarded to such individual for a literature fellowship, National Heritage Fellowship, or American Jazz Masters Fellowship.”); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 329, 111 Stat. 1543, 1600 (1997) (same); see also Daniel J. Wakin, *N.E.A. to Honor Opera*, N.Y. TIMES, May 13, 2008, available at <http://artsbeat.blogs.nytimes.com/2008/05/13/nea-to-honor-opera/> (quoting NEA chairman Dana Gioia as saying the \$25,000 Opera Honors awards have “enormous symbolic value”); COWEN, *supra* note 2, at 98 (“Successes become harder to find, however, once the NEA could no longer make significant grants to individual artists and could no longer support controversial projects.”).

53. See COWEN, *supra* note 2, at 96 (stating that the NEA “provides marginal funding to projects that probably would have existed anyway”). Additionally, by law, 40% of NEA funds must go to state arts organizations, which are typically even more conservative than the NEA and, at any rate, are subject to the same overall funding guidelines. For these reasons, Professor Hamilton argues that government involvement in the creation of art is inferior to prioritizing arts education. Hamilton, *supra* note 36, at 115-17 (“[F]ederal funding has tended to direct artistic energy away from the production of new and interesting works toward the creation of mediocre works. . . . [W]here the instrumental value of art lies in its capacity to question and undermine the status quo, the art experts on whom the government . . . depend . . . seem ill-placed.”). The basis for this distinction is unclear (as it would seem that arts education would suffer from even greater pressure to conform to government orthodoxy) and at any rate is based upon the assumption that government support for the arts has taken the forms only of comprehensive support for artists (as in the Work Projects Administration’s Federal Arts Project during the Great Depression), and project grants under the NEA. Nonetheless, the essential point is that the proliferation of art, especially boundary-pushing art, has value in a democracy above and beyond its explicit content or even its educational nature.

54. See discussion *supra* note 23.

55. NEA-established peer review panels automatically discount the “new,” and government funding skews (internal) workings of private arts market and causes institutions to shape themselves in ways they think will maximize (or at least not jeopardize) their funding. Hamilton, *supra* note 36, at 115-16. Because it is easier to agree about great art of the past, governmental artistic successes often focus on the preservation of our artistic heritage. COWEN, *supra* note 2, at 42-45.

the country's soft power by acting as a check and balance on science on the one hand and complacency on the other.

C. Indirect Support: The Tax Subsidy

Decentralized funding supported by the tax subsidy is widely considered a particular strength of the American system.⁵⁶ Although most purported benefits of tax incentives can theoretically be accomplished with properly structured direct assistance,⁵⁷ a tax subsidy has certain structural and practical advantages over direct funding, as evidenced by the experience of the NEA, that necessitate its prominent role in arts funding policy.

Most importantly for this Article, decentralized funding has the advantage of removing certain funding decisions from the political process, thereby fostering experimentation and diversity of viewpoint.⁵⁸ The tax subsidy, rather than a direct subsidy, more easily allows for the types of risky and controversial art that contribute to a healthy democracy.⁵⁹ Further, decentralized funding supported by the

56. See 20 U.S.C. § 951(2) (2006) ("The encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, are also appropriate matters of concern to the Federal Government."). "Philanthropy, by its very mission, takes risks and strategically invests in the public good in ways no government could do." Steven Gunderson, Letter to the Editor, *Private giving, Public Spending*, N.Y. TIMES, Jan. 29, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9901E0D91531F93AA15752C0A96E9C8B6> 3. For a compelling argument that an altruistic purpose, regardless of the good or service provided, in and of itself warrants tax exemption because it decentralizes and necessarily diversifies decision-making, see Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990).

57. See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) (describing use of term "tax incentive" and arguing for superiority of direct subsidies); see also Richard Epstein, *Constitutional Conundrums in the Public Funding of the Arts*, (Mar. 8, 2000), in *Arts Funding and Censorship: The Helms Amendment and Beyond: A Forum Sponsored by The Samuel Rubin Program for Liberty and Equality Through Law*, 15 COLUM. J.L. & ARTS 23, 36-37 (1990) (arguing for matching grants from government: government gives 28% of artist's total grant, without restrictions, if artist could first raise remaining 72%); Daniel N. Shavero, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 191 (2004) ("The distinction between taxes and spending . . . depends on pure form."). In terms of "warm glow," citizen-supported (and government-subsidized) arts funding can give rise to the same feelings of national pride and warm glow that direct funding is purported to yield.

58. "The genius of the American system is to get most arts support off the direct public books . . . American policy provides support for artistic nonprofits but lets donors decide which institutions will receive the funds. The government is removed from the role of judging artistic quality, yet creative activity receives a spur nonetheless." COWEN, *supra* note 2, at 31-33.

59. See, e.g., Colombo, *supra* note 18, at 364-65 (quoting Nicholas P. Cafardi, *The Third Sector*, reprinted in NICHOLAS P. CAFARDI & JACLYN FABIAN CHERRY, *TAX EXEMPT ORGANIZATIONS: CASES AND MATERIALS* 90, 92 (2003) ("America needs voluntary, nonprofit groups, not just because of what they do, but because of what they are, because their very existence is a guarantee of the diversity that protects the freedom of us all.")).

tax subsidy is itself democratic—it encourages private decisionmaking in the place of government dictates.⁶⁰

This yields greater diversity of voices and viewpoints in the public discourse and partially addresses an inherent feature of cultural markets that is shared with other informational endeavors, such as scientific research and development that command governmental subsidization. Variety is a necessary precondition for success,⁶¹ and so the inherent price of a few eventual successes that everyone can share is a much greater number of failures.⁶² This is an issue for direct funding of speculative endeavors generally, and much better suited to decentralized funding rather than direct government support. In the arts context, decentralized funding more effectively accomplishes the goal of maximizing variety while offering practical advantages over direct funding.⁶³

60. The charitable deduction illustrates that “the tax system can be understood as allowing dispersed donors to determine which agents, projects, or causes the government will finance.” Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 388 (1998). On the other hand, there are arguments that the public support for the arts is in effect undemocratic. A progressive rate of tax gives a greater subsidy for charitable giving to high tax bracket donors than to low tax bracket donors. Because high income taxpayers give more to the arts than low income taxpayers regardless of marginal tax rate, this leads to the fundamental problem that all taxpayers subsidize arts expenditures, the allocation (and, to a certain extent, the use) of which is largely controlled by wealthy donors. See Schuster, *supra* note 2, at 45 (“The interaction of high marginal tax rates with donor tastes and preferences has meant that donations to arts institutions have included the highest proportion of tax expenditures of any charitable sector.”) (citing A. L. FELD, M. O’HARE & J. M. D. SCHUSTER, *PATRONS DESPITE THEMSELVES: TAXPAYERS AND ARTS POLICY* (1983)). To the extent the goal is maximizing the net amount of arts funding (the benefits of which redound back to the population at large), the above set of concerns should be addressed, rather than serve to undermine an otherwise superior mechanism for fundraising. The practical alternative, centralized government funding, adds its own set of bureaucratic “overhead” costs and, as discussed above, cannot effectively address the justifications for support in the first place.

61. See Posner, *supra* note 36, at 518 (“We can bolster the presumption in favor of a permissive judicial attitude toward offensive art by noting that the ‘test of time’ that is the closest we seem to be able to get to an objective measure of artistic value presupposes, like natural selection in the theory of biological evolution (which the test of time resembles), the existence of variety, from which history makes its selections.”).

62. See COWEN, *supra* note 2, at 47 (“The next governmental success story is one that we cannot yet imagine.”).

63. While direct support requires an agency within the executive branch of the government to actively administer the support program, the tax subsidy decentralizes this function to a certain extent (with oversight, to be sure, by the Treasury Department and IRS, which already exist). Additionally, as a theoretical matter at least, a tax subsidy effectively takes precedence over discretionary direct funding programs because direct aid programs should only be funded out of tax revenue that is collected after the tax subsidy has reduced tax receipts. The existence of deficit funding in the real world of course partially negates this point; however, the general point remains that indirect support is often less controversial than direct support.

It is also worth noting the relationship between government funding and private (subsidized) giving. The issue is whether government support encourages private giving (“crowding in”), or replaces private giving (“crowding out”). The imprimatur of direct NEA funding might encourage private giving to the arts because of the reputational effects of NEA funding, the information signaling function served by such funding, and perhaps ex-

Determining that decentralized funding is the proper method of delivering support does not necessarily address the underlying market failure necessitating the public support in the first place.⁶⁴ If decentralized funders have circumscribed funding options, then the benefits of decentralization are not necessarily being realized. I.R.C. § 501(c)(3) governs which types of artistic and other charitable organizations are eligible to receive tax-deductible funding. The tax code plays the role of gatekeeper with respect to the tax subsidy for decentralized arts support.

III. ARTS ORGANIZATIONS UNDER I.R.C. § 501(c)(3)

A. Current Law

I.R.C. § 501(c)(3) lists as exempt from federal income tax certain organizations that are

organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.⁶⁵

plicit matching fund arrangements (as in the case of public radio, for example). On the other hand, direct government funding may suggest less need and thus depress private giving. See TAYLOR & BARRESI, *supra* note 33, at 3-6. The NEA estimates that the multiplier effect of each grant dollar is 7-8 in terms of attracting private donations and earned revenue to the grant recipient. See NATIONAL ENDOWMENT FOR THE ARTS, *supra* note 3, at 3. Independent research, although incomplete and inconclusive, suggests that the relationship between government funding and donations is not linear and, in the case of the performing arts at least, low levels of direct government funding induce private support; but when government subsidies reach about one-quarter of organizations' total budgets, private funding gets crowded out. Arthur C. Brooks, *Public Subsidies and Charitable Giving: Crowding out, Crowding in, or Both?*, 19(3) J. OF POL'Y ANALYSIS & MGMT. 451 (2000); see also Arthur C. Brooks, *Is There a Dark Side to Government Support for Nonprofits?*, 60(3) PUB. ADMIN. REV. 211 (2000).

64. Professor Cowen and others, however, make too much of the decentralization argument. When Professor Cowen states that "[t]he American tax system thus favors decentralization of nonprofit activities, rather than any particular conception of art," he is overlooking the requirement that art endeavors need be sufficiently "charitable" or "educational" in order to qualify for tax-deductible funding. COWEN, *supra* note 2, at 41. While he does acknowledge that the system "inevitably favors some artistic visions over others, whether intentionally or not," he identifies the projects that are favored as those that "can earn niches in a decentralized world." *Id.*

65. I.R.C. § 501(a), (c)(3) (2006). § 501(c)(4) also provides for exemption of "social welfare organizations" that are not organized for profit but operate exclusively for the promotion of social welfare. "Social welfare" has taken on a broad, catch-all meaning and has defied precise definition. Generally, social welfare organizations are meant primarily to promote the common good of the community as a whole rather than benefit a private group of citizens. See, e.g., *Erie Endowment v. United States*, 316 F.2d 151, 156 (3d Cir. 1963) (stating that a social welfare organization "must be a community movement designed to accomplish community ends"). However, membership organizations and in exceptional circumstances organizations whose services are available only to members are not automatically

The Treasury Regulations relating to these provisions reiterate the list of exempt organizations, except organizations that foster national or international amateur sports competition.⁶⁶ In addition, the Treasury Regulations further purport to define some, but not all, types of exempt organizations—specifically “charitable,” “educational,” “testing for public safety,” and “scientific.” Left undefined are the terms “religious,” “literary,” “prevention of cruelty to animals,” and, of course, “foster national or international amateur sports competition.”⁶⁷

“Charitable” can mean, among other things, the “advancement of education or science; erection or maintenance of public buildings, monuments, or works; [or] lessening of the burdens of Government.”⁶⁸ Advancement of the arts is not identified as an endeavor that is inherently charitable. Instead, arts organizations are typically evaluated based upon whether or not they are sufficiently “educational.”

“Educational” relates to “(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.”⁶⁹ Museums, zoos, planetariums,

disqualified under I.R.C. § 501(c)(4). An organization whose purpose was to develop and encourage interest in painting, sculpture, and other art forms by means of an annual three-day community art show where admission is free, the work of local and student artists was featured, and sale of works was not a requirement for exhibiting, qualified for exemption under I.R.C. § 501(c)(4). Rev. Rul. 78-131, 1978-1 C.B. 156. Compare the result in Revenue Ruling 66-178, where a similar organization qualified for exemption under I.R.C. § 501(c)(3). Rev. Rul. 66-178, 1966-1 C.B. 138. The catch is that for the donor’s income tax purposes, contributions to organizations exempt under I.R.C. § 501(c)(4) are not deductible. I.R.C. §§ 170(a)(1), (c)(2)(B). For an argument supporting the elimination of the distinction between I.R.C. § 501(c)(3) and I.R.C. § 501(c)(4) organizations, see Note, *I.R.S. Denials of Charitable Status: A Social Welfare Organization Problem*, 82 MICH. L. REV. 508 (1983).

66. “An organization may be exempt as an organization described in § 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals.” Treas. Reg. § 1.501(c)(3)-1(d)(1)(i)-(g) (1959).

67. Treas. Reg. §§ 1.501(c)(3)-1(d)(2)-(5).

68. Treas. Reg. § 1.501(c)(3)-1(d)(2). Despite the cross-referencing of terms within this list, it is clear that each item on the list is a distinct and separate category. See *Bob Jones Univ. v. United States*, 639 F.2d 147, 157 (4th Cir. 1981) (Widener, J. dissenting). An organization can misidentify itself when applying for exemption and still be granted an exemption (so long as it fits one of the exempt purposes). Treas. Reg. § 1.501(c)(3)-1(d)(1)(iii).

69. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i). The IRS has long held that promoting the arts is “educational.” See, e.g., Rev. Rul. 64-175, 1964-1 C.B. 185. Certain estate tax provisions deduct from the taxable estate the value of transfers made “to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art.” I.R.C. §§ 2055(a)(2), 2106(a)(2)(A)(ii). Note that the language in these provisions generally tracks the language in I.R.C. § 501(c)(3), except for the inclusion of the words “including the encouragement of art.” Note also that the provisions of the U.S. Code dealing with the National Foundation on the Arts and Humanities (and the NEA) are contained in Chapter 20 of the U.S. Code: Education. 20 U.S.C. §§ 951-960 (2006). “Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters

symphony orchestras, and other similar organizations are given as examples of educational organizations.⁷⁰

This definition seems broad and indeed permits of a wide range of exempt arts organizations and activities.⁷¹ As a case in point, the IRS has explained that a museum's exempt educational purposes are furthered by "stimulating and enhancing public awareness, interest, and appreciation of art" as well as encouraging "a broader segment of the public . . . to visit."⁷²

The main fault line in IRS and judicial determinations runs between the categories of "educational" and "commercial," and the contortions through which the IRS and the courts put themselves through in order to distinguish the educational from the impermissibly commercial illustrate that the "educational" category is ill-suited for the policy goals justifying public support of the arts.

As a general matter, the trend in the public discourse and in education policy has been a narrowing of the conception of "educational" to an idea of education that is limited to measurable indicia of educational achievement. In fact, the relationship between the arts and educational achievement is far from clear.⁷³ No less an expert than Professor Hansmann has identified the IRS's categorization of the performing arts as educational as an act of "expansive reinterpretation."⁷⁴ Furthermore, a focus on commerciality versus education unnecessarily disqualifies certain arts organizations that would so qualify under I.R.C. § 501(c)(3) if their purposes were recognized as ad-

of their technology and not its unthinking servants." 20 U.S.C. § 951(4) (2006); *see also* 20 U.S.C. § 954(a) (2006) ("Access to the arts through support of education.").

70. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 4.

71. The Internal Revenue Manual, Part 7.25.3.7.10, provides, "[t]he promotion of the arts and of culture is generally recognized as an educational activity," and lists, among others, the following activities as acceptable: "[p]romoting the dramatic arts," Rev. Rul. 64-175, 1964-1 C.B. 185; "[o]perating a nonprofit school of contemporary dance," Rev. Rul. 65-270, 1965-2 C.B. 160; "[p]romoting jazz festivals and jazz concerts," Rev. Rul. 65-271, 1965-2 C.B. 161; "[g]roup harmony singing," Rev. Rul. 66-46, 1966-1 C.B. 133; "[f]ellowship grants to students or to qualified writers and artists," Rev. Rul. 66-103, 1966-1 C.B. 134; and "[c]onducting annual festivals to provide unknown film makers with opportunities to display their films," Rev. Rul. 75-471, 1975-2 C.B. 207.

72. Rev. Rul. 73-104, 1973-1 C.B. 263 (analyzing requirement for nonapplication of tax on "unrelated business taxable income" ("UBIT") that a trade or business regularly carried on by an exempt organization—in this case, the operation of a gift shop selling cards that contained information about original artwork in the museum—be substantially related to the organization's exempt purpose), *considered in* IRS Gen. Couns. Mem. 35, 146 (Nov. 30, 1972).

73. Recent research has strained the assumed link between arts education and general education achievement. *See* LOIS HETLAND ET AL., *STUDIO THINKING: THE REAL BENEFITS OF VISUAL ARTS EDUCATION* (2007) (arguing that arts education is beneficial not because it improves standardized test scores generally but because it fosters positive mental habits such as the ability to question, explore, envision alternate possibilities and make open-minded judgments).

74. Hansmann, *Rationale*, *supra* note 10, at 57 n.16.

vancing the arts, and it disallows needed support of individual artists. The superiority of indirect support for art may not necessarily be applicable to the support of education generally—which, to be sure, should include art. The assumed relationship between education and art, therefore, should not be relied upon to privilege arts funding. The two are conceptually different, and their relationship is dynamic and susceptible to reevaluation as political concerns dictate.

B. The Problem with the Educational Criterion

The following discussion identifies two separate aspects of the problem with the educational criterion as applied to arts organizations. The first is the balancing test between public good and private benefit that is applied to arts organizations by virtue of their classification as “educational.” Second, a focus on the educational aspects of art is akin to the focus, in the constitutional law context, on the marketplace of ideas and art’s “serious artistic value”: both neglect to fully appreciate art’s value to defamiliarize and challenge the status quo.⁷⁵

1. Education vs. Commerciality

I.R.C. § 501(c)(3) requires that an exempt organization be organized and operated exclusively for exempt purposes. An organization meets this test if it engages primarily in activities that accomplish one or more of its exempt purposes.⁷⁶ An organization does not meet the organizational test if it serves a private interest rather than a public exempt purpose.⁷⁷ The most important factor in determining whether the interest being served is public or private is generally the extent and nature of the organization’s commercial activity. There is a sliding scale: the public interest being served is weighed against the amount of commerciality of the activity. It is not the absolute amount of commerciality that is dispositive in a given instance; greater or lesser amounts of commerciality and private benefit are allowed depending on the public goal being served.

A series of Tax Court cases, Revenue Rulings, and other IRS authorities attempt to delineate permissible educational behavior by arts organizations from impermissibly commercial behavior, but the

75. See *supra* notes 37-39 and accompanying text.

76. Treas. Reg. § 1.501(c)(3)-1(c)(1). A single substantial nonexempt purpose disqualifies an organization. *Better Bus. Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

77. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (“An organization is not organized or operated exclusively for one or more of the purposes . . . unless it serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.”).

authorities draw a line that, while apparently permissive, actually could end up hindering the advancement of the diversity of art necessary to benefit democratic operations.

In *Goldsboro Art League v. Commissioner*, the Tax Court found that an art gallery qualified for tax exemption because it fostered community awareness and appreciation of contemporary artists and provided subject material for art students by holding art classes, workshops, and exhibitions of the artwork of public school children.⁷⁸ The fact that the organization also operated a public art gallery of works selected by a jury and offered for sale to the public—and kept a 10% commission on art that is sold—did not disqualify the organization because the sales activities were incidental to its overall purpose. Also, there was no private benefit to the artists whose works were sold as the artists had no control over the jury selection.⁷⁹

Commercial sales in and of themselves were also not problematic in a variety of other situations not involving private benefit. In Revenue Ruling 73-104, the sale of art reproductions was found to “stimulat[e] and enhanc[e] public awareness, interest and appreciation of art.”⁸⁰ Also, a museum’s sale of art books and reproductions of items *not* in the museum did not generate unrelated business income because such sales enhanced the appreciation of art generally.⁸¹

Even rentals and consignment sales of art, in the case of a gallery located in an area remote from other art galleries, can be deemed in furtherance of the permissible purpose of increasing awareness of and appreciation for art in a local community.⁸² Additionally, both

78. 75 T.C. 337 (1980).

79. *Id.* at 344-45. *Cleveland Creative Arts Guild v. Commissioner*, 50 T.C.M. (CCH) 272 (1985), found that an organization similar to the one in *Goldsboro* was entitled to exemption even though it did not screen the artwork it displayed. Also note Revenue Ruling 66-178, which holds that an organization that fosters and develops the arts by putting on a public art exhibit at which works (selected by an expert panel) of unknown artists are displayed (free of charge to the artist) but not sold can qualify for tax exemption under I.R.C. § 501(c)(3). Rev. Rul. 66-178, 1966-1 C.B. 138.

80. Rev. Rul. 73-104, 1973-1 C.B. 263. The “frankly commercial scope of the methods of distribution endorsed in Rev. Rul. 73-104” made the IRS “not entirely comfortable,” but it felt “unable to develop a satisfactory legal rationale for a more restrictive rule.” IRS Gen. Couns. Mem. 37,902 (Mar. 28, 1979); *see* IRS Gen. Couns. Mem. 39,346 (Mar. 15, 1985) (discussing cost plus veterinary services in the context of not for profit animal shelters).

81. Rev. Rul. 73-105, 1973-1 C.B. 264.

82. IRS Tech. Adv. Mem. 86-34-001 (Aug. 13, 1986) (noting also that works to be exhibited on a rental basis were selected for exhibit for “based on quality, craftsmanship, educational value, and professionalism.”). The convoluted nature of such inquiries equating promotion of the arts with the permissible exempt purpose of promoting education can be seen in another UBIT case involving items for sale at a museum’s store. In a Technical Advice Memorandum, the IRS found that a museum’s sale of items that “develop a child’s artistic ability,” such as paint sets and coloring books, is related to its exempt educational purpose; but that its sale of items that “develop a child’s motor skills,” such as blocks and toy cooking utensils, are not sufficiently related (even though they “arguably teach children about shapes and colors”). IRS Tech. Adv. Mem 97-20-002 (May 16, 1997).

Goldsboro Art League and *Cleveland Creative Arts Guild* emphasized that there were no other art galleries or museums in the area.⁸³

The IRS has also allowed commerciality on the part of arts organizations in order to address a specific market failure. In Revenue Ruling 79-369, an organization formed to create, develop, and promote an appreciation of contemporary symphony and chamber music was granted an exemption even though its primary activity was to record and sell (mostly to educational institutions) relatively unknown works that are not generally produced and sold by the commercial music publishing and recording industry.⁸⁴

Revenue Ruling 71-395, on the other hand, found that a cooperative art gallery ran by approximately fifty artists for the purpose of selling their works does not qualify for tax exemption because the gallery was being used as a “vehicle for advancing [the] careers” of the artist-members who ran the gallery.⁸⁵ Thus, an organization that displays and sells the artwork of “any artist that chooses to become a member” is compared to the organization in Revenue Ruling 71-395 and is deemed a means for serving the private interests of members by advancing their careers and promoting the sale of their work, “even though the exhibition and sale of paintings may be an educational activity in other respects.”⁸⁶ The IRS believes that these organizations provide benefits to their members that outweigh their benefit to the community.

These authorities purport to establish that, in the name of education, arts organizations can operate commercially in order to sell art or art-related items, so long as no actual artists are directly benefitted. But the test is not consistently applied even in the educational setting.

83. *Goldsboro*, 75 T.C. at 344; *Cleveland Creative Arts Guild*, 50 T.C.M.(CCH) 272.

84. Rev. Rul. 79-369, 1979-2 C.B. 226; see also Rev. Rul. 67-342, 1967-2 C.B. 187 (organization producing and disseminating educational films via commercial television may qualify for exemption where the films are presented in a noncommercial manner); Rev. Rul. 75-471, 1975-2 C.B. 207 (film festival for independent filmmakers qualifies for exemption because films exhibited are not for sale and because they were chosen for their lack of commercial overtones); I.R.S. N.S.A.R. 20044038E, 2004 WL 2203370 (Mar. 24, 2004 (“[A]n organization may achieve its educational purpose so long as the programs are presented in a noncommercial manner. The absence of commercial advertising is a key factor in determining the noncommercial nature of the activity.”)).

85. Rev. Rul. 71-395, 1971-2 C.B. 228.

86. I.R.S. N.S.A.R. 20044014E, 2004 WL 2203359 (Mar. 16, 2004); see also I.R.S. N.S.A.R. 20044037E, 2004 WL 2203369 (Jan. 9, 2004) (organization denied exemption because its only significant activity is an art show that was oriented toward art sales rather than art education). The IRS extended the core holding of Revenue Ruling 71-395 to an organization formed by patrons to promote understanding of modern art by exhibiting and selling the work of local artists who did not have to be a member of the organization to have work displayed because the artists were being directly and privately benefitted by the organization’s activities, even though such benefit was in furtherance of the organization’s exempt purpose. Rev. Rul. 76-152, 1976-1 C.B. 151; see also 1988 I.R.S. N.S.A.R. 2159R, 1988 WL 1523036 (Sept. 14, 1988).

For example, in Revenue Ruling 67-392, an organization devoted to fostering the abilities of young concert musicians was allowed an exemption despite securing for the artists, free of charge, paid engagements to “improve their professional standing.”⁸⁷ Here, the organization’s educational purpose, to train artists “to the point where they can support themselves financially though their musical talents,” was served by conferring a private benefit on particular artists.⁸⁸ Surely the test cannot turn on the age of the artist being benefitted.

A more relevant approach would be to allow greater commerciality in the service of advancing art. The balancing test, with respect to the situations governed by Revenue Ruling 71-395, may very well have come out differently had the scale weighed private benefit against the public interest in art rather than against the public interest in education. The advancement of art entails a concern not squarely applicable to the pursuit of education—the necessity that the government “create and sustain . . . the material conditions facilitating the release of [American] creative talent.”⁸⁹ The exact identification of the underlying purpose matters because the balancing test is different depending upon the public interest being served.

When it comes to science, art’s supposed counterpart and complement, private benefit incidental to the furtherance of the public cause does *not* necessarily result in a finding that the scientific research is not in the public interest. For example, the IRS has determined that a charity that conducts scientific research on behalf of a for-profit company is nonetheless serving a public interest.⁹⁰ In fact, the applicable Treasury Regulations countenance scientific research as in the public interest even if intellectual property yielded by research conducted pursuant to an agreement between a nonprofit and a for-profit sponsor is retained by such sponsor.⁹¹ In other words, incidental private benefit in the tax exempt scientific context does not create a presumption of ineligibility for exemption as it does in the educational context.

Despite the more stringent limitations on commerciality deemed unrelated to an arts organization’s exempt purpose, nonprofit arts organizations are expected to behave commercially.⁹² After all, much

87. Rev. Rul. 67-392, 1967-2 C.B. 191.

88. *Id.* at 192.

89. 20 U.S.C. § 951(7) (2006).

90. IRS Tech. Adv. Mem. 2009-05-033 (Jan. 30, 2009).

91. Treas. Reg. § 1.501(c)(3)-1(d)(5)(iii)(c)(4).

92. See Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law*, 73 *FORDHAM L. REV.* 2437, 2440 (2005) (arguing that “[w]e should not force charities to embrace the marketplace and pay their own way, and at the same time leave in place legal doctrines that punish them for doing so”). Assuming that the educational nature of the arts justifies its tax exemption, sales of art could very well further the educational purpose of “training of the individual for the purpose of improving or

of U.S. culture, including art, is profit-seeking to some extent.⁹³ The market-driven mentality is so ingrained that even when we attempt to address market failures, we use market solutions such as “venture philanthropy.” We increasingly require arts nonprofits to comply with commercial demands such as providing quantifiable metrics of their effectiveness and efficiency; creating partnerships and developing models with for-profit entities; focusing on entrepreneurialism, marketing, and deliverables; and generating more earned income to “pay their own way.”⁹⁴

To compound the issue, the conservative mandate of the NEA combined with the tax subsidy’s education-commerce distinction has divided the art world, for public policy purposes, into either the popular or commercial, on the one hand, and the elite or educational on the other. In the former category, art is treated as a commodity and corporate asset, subject only to market considerations; in the latter, art is something bestowed upon the public for its own sake by an inherently conservative and paternalistic few.⁹⁵

Such a bifurcation does not align well with the underlying concern of whether or not art is being properly advanced. The distinction between educational and commercial distracts attention from art’s real value to a democracy and fails to place art on an equal footing with science. Commerciality is only allowed up to the point where artists are actually being benefitted. A fulsome effort at fostering the diversity of art that justifies its public support would weigh public against private benefit in light of such a purpose, as opposed to the purpose

developing his capabilities,” or “instruct[ing] the public on subjects useful to the individual and beneficial to the community.” Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(a)-(b). With regard to the former, “[t]he experience of exhibiting and attempting to sell art works is likely to be essential for an artist’s development.” Edward J. Rodriguez, *Federal Tax Exemption Status of the Private Nonprofit Art Association*, 10 CONN. L. REV. 653, 661 (1978). With regard to the latter, the sale of art work might attract (and thus educate) more of the public and make art more widely disseminated, increasing its impact on the public. If the goal is to encourage participation in the arts, it appears necessary at some level that artists benefit from the funding regime.

93. The bright line distinction between commercial art endeavors and nonprofit arts organizations is a synthetic one. The two categories are blurred and interrelated. For one, commercial culture often draws upon government-subsidized art—using it, in effect, as research and development. Much for-profit art was born of nonprofit beginnings—thus indirect subsidies strengthen the entire arts sector, not just the nonprofit arts sector.

94. Kelley, *supra* note 92, at 2437-39. Professor Colombo sensibly argues that it is impossible for charities (such as healthcare providers and arts organizations) to properly function in a commercial world without acting in a commercial way in some respects. Thus, in cases of “commercial similarity,” the question should be whether the organization provides access to services for previously-underserved populations or provides specific services to the majority population that otherwise are not provided by the private sector. But the access theory also relies on the gate-keeping function of § 501(c)(3). “An access-based test, for example, would provide little help in defining what is a ‘religious organization’ or an ‘educational organization’ under § 501(c)(3).” Colombo, *supra* note 18, at 386.

95. “[T]he supply-side demands of refined arts elites are uncritically accepted as gospel.” Ivey, *supra* note 8, at 53.

of education in general. The fulfillment of such a goal must allow for some direct support of individual artists, for where else does art come from and how else can the positive externalities of art be generated if not by artists? If art were treated more like science, nonprofit arts organizations like those described in Revenue Rulings 71-395 and 76-152 would be allowed to operate as tax exempt, so long as the private benefit to the participating artists was in proper proportion to the public goals being served, namely, the advancement of art.

2. Education vs. Nonrationality

Even though “[p]rivate, nonprofit art associations traditionally have had little difficulty becoming tax exempt,”⁹⁶ that might not always be the case. There is danger that the educational criterion could become an instrument of suppression in the same way that NEA decency standards are. In the meantime, reliance on a utilitarian educational standard that focuses on usefulness and rationality chills on-the-border arts groups who, for example, desire to pursue controversial, nontraditional, or nondiscursive art, from engaging in such activities or from undertaking the burden of applying for exemption in the first place.⁹⁷ The educational criterion also affects the behavior and choices of existing groups and places unnecessary restrictions on arts organizations that hinder their ability to deliver the positive externalities that justify their existence. As in the case of restricted NEA funding, overreliance on the “educational” criterion leads to the type of conservatism that can make cultural policy ineffective.⁹⁸ Art as education runs the risk that it will validate rather than question the predominant worldview if it is narrowly constrained (which appears inevitable in the educational context).

The educational criterion focuses on the relationship between art and rational, discursive thought without proper heed for the nonrational, nondiscursive faculties that complete our intelligence and enhance our ability to effectively participate in a democracy.⁹⁹ The subversive and experimental art that is so important to the fostering of

96. Rodriguez, *supra* note 92, at 653.

97. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 566, 621 (1998) (Souter, J., dissenting) (“[T]he makers or exhibitors of controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether.”).

98. “[T]he desperate need to retain grant support, patrons, and subscription audiences constrains creativity and encourages conservative, repetitious programming that is a far cry from the innovation and experimentation envisioned by the [nonprofit] sector’s advocates. . . . Competition for audiences and funding among non-profits encourages the same kind of conservative artistic choices that are forced on record companies and film studios by the demands of shareholder value.” IVEY, *supra* note 3, at 209, 214.

99. Hamilton, *supra* note 36, at 109 (“While art can address and work through rational faculties, it is neither limited to nor dependent upon them, and even empowers such faculties to subvert their own assumptions. Art stands on much firmer ground if its capacity to communicate nondiscursively is recognized . . .”).

liberty is the type of expression most likely to be discouraged by the use of a utilitarian educational standard. As in the constitutional law context, a focus on the discursive and educational aspects of art overlooks art's more abstract nonsemantic properties. Such a focus orients the entire charitably supported arts machinery in a direction that is askew from its target—the advancement of a variety of art, whether educational or not. It is in this way too that the tax subsidy mechanism is most suited to arts support, whereas education, for example, might present a better case for direct support.

Furthermore, the educational criterion and its concern with commerciality fail to treat the advancement of the arts in the same way that the advancement of science is treated. In the latter case, commerciality is accepted as a necessity of the underlying goal of promoting science; in the former, incidental private benefit is presumptively in conflict with the underlying public interest. Arts are supported when they are strictly educational; but supporting arts for their own sake would permit of greater support of the arts and artists without whom democracy-enhancing art does not get made.

IV. PROPOSAL

The Code has never classified artistic and cultural groups as qualifying for tax exemption as such. While the Internal Revenue Service, under the “educational” tax exempt category, has issued rulings qualifying cultural and arts organizations as tax exempt, the lack of explicit statutory recognition of the tax exempt quality of cultural and artistic organizations generates unnecessary difficulties for individuals and organizations engaged in these fields. They are obliged to meet “educational” standards of dubious relevancy, instead of being judged for what they are; a draft horse and a race horse may fit under the same general category but it is helpful and wise to think of them performing different functions.¹⁰⁰

For the reasons discussed above, this Article's proposal is to make U.S. public arts policy explicit by amending I.R.C. § 501(c)(3) to specifically list arts organizations as eligible for the federal income tax exemption.¹⁰¹ By decoupling art from the expectation that it be educa-

100. John B. Hightower, President, Assoc. Couns. of the Arts, presented to H. Comm. on Ways and Means (Apr. 11, 1973) *reprinted in* 4 PERFORMING ARTS REV. 74, 78-9 (1973).

101. There is precedent for adding a specific term to I.R.C. § 501(c)(3). The Tax Reform Act of 1976 amended I.R.C. § 501(c)(3) to include organizations that “foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment).” Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313, 90 Stat. 1520. “Prior policy on the qualification for section 501(c)(3) status has been a source of confusion and inequity for amateur sports organizations whereby some gained favored tax-exempt status while others, apparently equally deserving, did not. The failure of some of these organizations to obtain section 501(c)(3) status and to qualify to receive tax-deductible contributions has discouraged contributions to these organizations, and has deterred other organizations from going through the legal expense of applying to the Internal

tional, such a change would allow for more commerciality on the one hand, and more subversiveness on the other, which promotes democracy-enhancing artistic variety.

The discussion so far leaves one particularly sticky point—the ponderous question that was the impetus for this inquiry in the first place: What is art?

Art is notoriously hard to define. Philosophers, scholars, jurists, and others have been struggling with the issue for millennia. As Justice Holmes famously wrote, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁰²

But Professor Farley has observed, and this Article’s proposal bears out, that “the legal category of art cannot be avoided.”¹⁰³ A definition, for purposes of direct funding, is provided in the National Foundation on the Arts and the Humanities Act, which defines “the arts” as including, *but not limited to* the following:

music (instrumental and vocal), dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, film, video, tape and sound recording, the arts related to the presentation, performance, execution, and exhibition of such major art forms, all those traditional arts practiced by the diverse peoples of this country[,] and the study and application of the arts to the human environment.¹⁰⁴

The IRS has also provided definitions of art for explicit and limited purposes such as valuation and depreciation.¹⁰⁵ In addition, definitions

Revenue Service for recognition of section 501(c)(3) status. Congress believes that it is, in general, appropriate to treat the fostering of national or international amateur sports competition as a charitable purpose.” STAFF OF J. COMM. ON TAX., 94TH CONGRESS, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 423 (1976); *see also* 1982 EO CPE Text, *available at* <http://www.irs.gov/pub/irs-tege/eotopica82.pdf> (last visited Mar. 26, 2010) (describing IRS position that promotion of sports is not per se educational).

102. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

103. Farley, *supra* note 17, at 808 (critiquing judicial decisionmaking for making disguised, rather than acknowledged and thoughtful, aesthetic decisions when faced with the question of whether or not an object is a work of art). For a survey of definitions of art used in various legal fields (such as intellectual property, customs, moral and economic rights, and consignment), see Leonard D. DuBoff, *What is Art? Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303, 351 (1990) (“A universal definition of art probably cannot go much further than stating that a work of art is an original expression of the creator, embodying a creative process in which the creation is distinctively the work of that creator. A more precise definition, although desirable, would not do justice to the diverse interests involved.”).

104. 20 U.S.C. § 952(b) (2006).

105. Rev. Proc. 96-15, 1996-1 C.B. 627, 627 (outlining details of IRS Statements of Value that taxpayers can request and rely upon in completing their federal tax returns that report the transfer of art, defined to include “paintings, sculpture, watercolors, prints, drawings, ce-

of art can be found in various provisions of federal tax law for narrow, specific purposes.¹⁰⁶ These definitions hew closely to the conservative notion of art adopted by the NEA and inherent in I.R.C. § 501(c)(3)'s requirement that arts organizations be sufficiently educational.

As expected, art in the funding context has historically meant "fine art."¹⁰⁷ But modernism, not to mention post-modernism (and post-post-modernism), have been eating away at that constrictive definition so that many "forms of America's expressive life" are now considered "art" by those whose business it is to define such things.¹⁰⁸

Thus, if only for the sake of conversation, Professor Adler offers a tentative two-part definition of art—1) that which is recognized as art by the art community (artists, critics, scholars, museums, galleries, and the like), and 2) expression that "makes us ask the question 'What is art?' in the first place."¹⁰⁹ Both parts acknowledge the role of

ramics, antique furniture, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects"); Rev. Rul. 68-232, 1968-1 C.B. 79 (stating, in generally disallowing depreciation of the value of works of art, "[a] valuable and treasured art piece does not have a determinable useful life"); *see also* John R. Thompson Co. v. United States, 338 F. Supp. 770 (N.D. Ill. 1971), *aff'd* 477 F.2d 164 (7th Cir. 1973) (applying Rev. Rul. 68-232 to determine that oil paintings permanently decorating a restaurant were nondepreciable art because they had no determinable useful life); *cf.* Judge v. Comm'r, 35 T.C.M. 1264, 1273 (1976) (finding paintings hung in a doctor's office to be depreciable "wall decorations" and not "works of art" because "the paintings acquired by petitioner were by unknown artists and were not of the kind ordinarily considered 'valuable and treasured' works of art. The paintings were acquired by petitioner for business use . . .").

106. For example, I.R.C. § 2055(e)(4)(B) (2006) defines a "work of art" as "any tangible personal property with respect to which there is a copyright under Federal law." This definition is relevant for estate tax and gift tax provisions governing deductions from the applicable taxable base for the value of charitable transfers of a "work of art" as distinct from the copyright therein. *See* I.R.C. § 2522(c)(3) (2006) (gift tax provision incorporating definition of "work of art" from § 2055(e)(4)). Another gift tax rule, I.R.C. § 2503(g)(2)(A) (2006), defines a "qualified work of art" as "any archaeological, historic, or creative tangible personal property." This definition governs when loans are to be treated as transfers for purposes of the gift tax; a loan of a "qualified work of art" is not treated as a transfer under certain conditions. In an analogous estate tax provision that treats works of art on loan for exhibition in the U.S. as property in the estate of nonresident, noncitizens, "works of art" goes undefined. I.R.C. § 2105(c) (2006). I.R.C. § 408(m)(1) deems the acquisition by an IRA of any collectible as a distribution from such an account; I.R.C. § 408(m)(2)(A) defines "collectible" as "any work of art" but does not further define "work of art". "Collectible" also means any rug or antique, any metal or gem, any stamp or certain coins, any alcoholic beverage, or any other specified tangible personal property. I.R.C. § 408(m)(2)-(3). Additionally, in calculating the taxable estates of citizens and noncitizens, transfers for the encouragement of art are deducted. I.R.C. §§ 2055(a)(2), 2106(a)(2)(A)(ii).

Federal copyright law, it should be noted, extends protection to a much larger class of art than only that which is educational; copyrightability is predicated upon some minimal creative or artistic authorship (which need be only "original," not necessarily meritorious). 17 U.S.C. § 102 (2006).

107. According to the former chair of the NEA, "[t]hat's pretty much the definition that is assumed in conversations in and around our federal arts agency." IVEY, *supra* note 8, at 51-52.

108. *Id.* at 52.

109. Amy Adler, *The Folly of Defining "Serious" Art*, in THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS 90, 97 (2004).

empiricism in defining art; art can be defined as much by what it does as by what it is.

While a satisfactory definition of art that accounts for all marginal and boundary-testing instances is elusive, Denis Dutton has identified twelve characteristics—the fundamental features of those things that are, across cultures and time, unquestionably art—that help to answer the question of what is art.¹¹⁰ Dutton also offers the hope that a definition of art need not necessarily “constrain the very creative imagination we observe and encourage in the arts.”¹¹¹

On the other hand, a number of scholars question whether art should be recognized as a legal category at all. Professor Adler has argued persuasively that, in the realms of obscenity law and moral rights law, the category of “art” necessarily breaks down.¹¹² Contemporary art, she argues, is in fact defined by its movement from the physical to the conceptual and by “its attack on the coherence of ‘art’ as a category.”¹¹³ Perhaps it is in recognition of the difficulty of defining art that federal income tax law with respect to charitable contributions currently dodges the issue by asking whether or not an endeavor is educational rather than whether or not it is art. The desire to avoid defining art is understandable, and even advisable; but the method of avoidance, requiring art to be judged according to educational criteria, undermines the rationale for arts support.

In the end, an explicit definition of art for purposes of I.R.C. § 501(c)(3) is not necessary in order to implement this Article’s proposal. After all, “religious,” “literary,” and “scientific” are effectively left undefined, despite their explicit inclusion on the list of eligible tax exempt purposes.

110. DENIS DUTTON, *THE ART INSTINCT: BEAUTY, PLEASURE, AND HUMAN EVOLUTION* 51-59 (2009) (listing direct pleasure, skill and virtuosity, style, novelty and creativity, criticism, representation, special focus, expressive individuality, emotional saturation, intellectual challenge, traditions and institutions, and imaginative experience as the “cluster criteria” reflecting the “most common and easily graspable ‘surface features’ of art”).

111. *Id.* at 63.

112. Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009) (arguing that the conception of “art” embedded in moral rights law—picturing art as special and unlike other objects—is the precise conception of ‘art’ that ‘artists’ have been rebelling against for the last forty years”); Adler, *supra* note 109, at 94 (positing that “[A]rt has begun to challenge the idea that there is any demarcation between art and non-art. And in doing so, art has become at times indistinguishable from obscenity.”); Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1548-50 (1996).

113. Adler, *Against Moral Rights*, *supra* note 112, at 287 (“[P]hysical attacks against art objects can be understood as particularly valuable forms of expression.”); *see also* Martha Bayles, *The Shock-Art Fallacy*, ATLANTIC MONTHLY, 20 (Feb. 1994) (noting that most Americans accept that art is essentially whatever the artist says it is); Farley, *supra* note 17, at 814 (“[A]s soon as the definition of art becomes closed, a new art practice will force it to be reopened.”).

Because we are using the tax code to implement national arts funding policy, the mechanism employed should be informed by the goals and justifications of arts policy. Explicitly including arts in I.R.C. § 501(c)(3) would effectively protect arts funding from changing political whims. The promise of America's multifaceted approach to funding the arts can be fulfilled if the governing statute explicitly acknowledges art's equivalence to science on the national list of priorities and art's unique and necessary contribution to the ongoing American democratic experiment.